No. 13310

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE W. REED AND INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FANNIE M. BOYLS,
RUTH C. GOLDMAN,
Attorneys,
National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

In the United States Court of Appeals for the Ninth Circuit

No. 13310

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GEORGE W. REED AND INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS UNION, LOCAL NO. 36, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 58–63)[1] issued against respondents on May 18, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*).[2] The Board's decision and order are reported in 94 N. L. R. B. 698. This Court has jurisdiction under Section 10 (e) of the Act, as the unfair labor prac-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

[2] The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 21–27.

tices in question occurred at San Francisco, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found, contrary to respondents' contentions, that the operations of respondent George W. Reed affect commerce within the meaning of the Act and that the Board should exercise its jurisdiction over Reed. The Board also found, and respondents concede (R. 33–34, 38, 56; 9–11, 76–79, 81–83, 127, 140, 159, 171, 182, 192–193) that Reed terminated the employment of hod carrier Charlton because the Union (International Hod Carriers, Building & Common Laborers Union of America, Local No. 36, AFL) demanded Charlton's discharge for failing to obtain Union clearance before taking a job with Reed. The Board concluded that Reed had violated Section 8 (a) (3) and (1) of the Act by terminating Charlton's employment under the circumstances and that the Union, by causing Reed to discriminate against Charlton, violated Section 8 (b) (2) and (1) (A) of the Act (R. 56–57).

The following subsidiary facts, as found by the Board, are substantially undisputed.

A. Respondent Reed's business

Respondent Reed is a masonry subcontractor in the San Francisco Bay area (R. 17; 87). He normally employs more than 25 bricklayers and hod carriers (R. 18; 88) in the performance of his contracts which, for the year 1949, were valued at $481,869 (R. 20; 106). At the time of Charlton's dismissal, Reed was

engaged in completing a $110,239 contract to build brick boiler room chimneys, garages, and trimmings for the Stonestown project, a multi-million-dollar apartment and commercial development in San Francisco (R. 18, 21–22, n. 15; 108–110, 115, 95–96).

Although most of Reed's masonry materials are produced and purchased in the State of California,[3] a substantial part of his work is done for firms which are engaged in interstate commerce (R. 19–26; 9–10, 89–91, 93–98, 118–121). The Board asserted jurisdiction in this case because of the effect on commerce of Reed's general operations as indicated by certain of his 1948–49 contracts which are shown in the following table (R. 56):

I Year	II Company[1] for which Reed performed services	III Nature of business[2]	IV Type of work done by Reed	V Value of Reed's subcontract
1948	Pacific Telephone & Telegraph Co.	Instrumentality of commerce; Public utility.	Masonry work on telephone exchange building.	$148,000 (R–19, 24; 89–90).
1948	Pacific Gas & Electric Co.	Public utility	Masonry work on substation.	$60,000 (R. 19, 24; 91).
1949	Pacific Telephone & Telegraph Co.	Instrumentality of commerce; Public utility.	Masonry and related work on new 9–10 story combination office and telephone exchange building.	$150,000 (R. 20, 25; 94–95).
1949	Standard Oil Co. of California.	Enterprise producing or handling goods destined for out-of-state shipment valued at more than $25,000 per annum.	Masonry and related work on new office building.	$200,000 (R. 20–21; 25–26; 98, 118–121).

[1] The Board's earlier findings (which respondents do not challenge) that these concerns (Column II) are engaged in commerce within the meaning of the Act, are reported at 74 N. L. R. B. 536 (Pacific Telephone & Telegraph Co., 7/17/47), 87 N. L. R. B. 257 (Pacific Gas & Electric Co., 11/29/49), and 79 N. L. R. B. 1466 (Standard Oil Company of California, 10/20/48). The parties stipulated (R. 20, n. 11; 93) that The Pacific Telephone & Telegraph Co. and The Pacific Gas & Electric Co. are public utilities with their main offices in San Francisco.

[2] The categories in Column III refer to the Board's classifications in *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635, *infra*, pp. 27-29 (R. 56, n. 2).

[3] The testimony of Respondent Reed that his only out-of-state purchase during 1949 was $1,900 worth of Indiana limestone (R. 100) is not disputed.

B. Reed discharges Employee Charlton upon the demand of the Union

Respondent Reed has, for many years, been one of approximately 40 members of the Masons and Builders Association of California, Inc., a group which bargains collectively and enters into multiple-employer contracts with respondent Union covering hod carriers employed by Reed and other Association members (R. 17–18; 185–187). Previous contracts had expired, however, and no new contract had been executed at the time of the unfair labor practices in this case (R. 18, n. 6; R. 186–187, Tr. 197).

On June 14, 1949, the Union's business agent, Joe Murphy, visited the Stonestown site, talked to some of Reed's employees there, and informed Reed's foreman, Pat McDonaugh, that one of his hod carriers, Ernest Sidney Charlton, would have to be laid off. Murphy explained that Charlton had failed to get a clearance from the Union [4] before taking the job with Reed and threatened to take the rest of the hod carriers off the job unless Charlton were dismissed at once. Foreman McDonaugh thereupon bowed to the Union's demand and immediately terminated Charlton's employment (R. 28–31; 76–79, 81–83, 127, 134–135, 138–140, 159, 176–178, 190–191, 10).

[4] The Union had, for many years, had a rule requiring each member to report the name of his prospective employer and obtain clearance from the Union before taking a new job (R. 31, 33, 35; 79, 81–82, 134–135, 140, 182–184, 192–193). Charlton was at the time of his discharge, as he had been for many years, a member of respondent Union (R. 28; 173, 182).

II. The Board's conclusions

Upon the foregoing facts, the Board concluded that Reed's operations affect commerce within the meaning of the Act and that it would "effectuate the policies of the Act to assert jurisdiction here" (R. 56).

With respect to the termination of Charlton's employment, the Board found that, by acquiescing in the Union's demand for Charlton's dismissal, Reed had, in effect, granted closed-shop rights to the Union, thereby encouraging Union membership and enabling respondent Union to enforce obedience to its internal rules by job discrimination in violation of the Act. The Board therefore concluded that respondent Reed, by dismissing Charlton, had committed unfair labor practices in violation of Sections 8 (a) (1) and (3) of the Act and that respondent Union, by causing Charlton's dismissal, had committed unfair labor practices in violation of 8 (b) (1) (A) and (2) (R. 56–57).

III. The Board's order

The Board's order (R. 59–63) directs respondent Reed to cease and desist from encouraging membership in respondent Union or any other labor organization of his employees by discriminating in regard to their employment except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

The Board's order requires the Union to cease and desist from causing or attempting to cause Reed to

discharge or otherwise discriminate against his employees, and from causing or attempting to cause any other employer engaged in commerce to discriminate against Charlton, except to the extent permitted by an agreement executed in accordance with Section 8 (a) (3) of the Act, and from restraining or coercing Charlton or any of Reed's employees in the exercise of the rights guaranteed in Section 7 of the Act.

Affirmatively, the Board's order directs Reed to offer Charlton reinstatement and the Union to notify Reed in writing that it has no objection to his employing Charlton. The order further requires Reed and the Union, jointly and severally, to make Charlton whole for any loss of pay suffered because of the discrimination against him, and to post appropriate notices.

SUMMARY OF ARGUMENT

I. The coverage of the Act is as broad as the power of Congress over interstate commerce and extends to local businesses which, in their interlacings with firms engaged in interstate commerce, may adversely affect that commerce. The substantial services furnished by Reed to public utilities, instrumentalities of commerce, and other enterprises largely engaged in interstate commerce clearly bring his operations within the coverage of the Act. Since the amount of such contributions by Reed is well in excess of the Board's standards for discretionary assertion of jurisdiction, the Board properly asserted jurisdiction here.

II. Reed's admitted lay-off of employee Charlton at the Union's request for failure to comply with a Union rule requiring him to obtain a clearance was

violative of the Act since it constituted enforcement of closed shop conditions and was not protected by a valid union security contract. Since application of closed shop requirements is prohibited under any other circumstances, Reed violated Section 8 (a) (3) and (1) of the Act by terminating Charlton's employment, and the Union violated Sections 8 (b) (2) and (1) (A) by causing Reed's action against Charlton.

An employer encourages union membership within the meaning of the statute when, by job discrimination, he encourages employees to become or remain union members in good standing.

III. The fact that Charlton may have been temporarily employed by respondent Reed pending recall by his former employer does not make the Board's order requiring Reed to offer him reinstatement inappropriate since he was not in fact recalled and the record does not indicate that Reed did not continue to need his services. Nor does any alleged reinstatement of Charlton subsequent to the close of the record in this case constitute a defense to the Board's petition for enforcement.

ARGUMENT

POINT I

Respondent Reed's operations affect interstate commerce and the Board properly asserted jurisdiction over them

Respondents' contention (R. 50–52, 212–213, 217) that the operations of Reed do not affect commerce within the meaning of the Act must be viewed in the light of the well-established principles that the cover-

age of the Act is as broad as the power of Congress over interstate commerce, and that the Act extends to businesses whose activities in isolation may be deemed local but which in their interlacings with other businesses across state lines adversely affect commerce. See *N. L. R. B.* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 683–685; *Polish National Alliance* v. *N. L. R. B.,* 322 U. S. 643, 647–648; *N. L. R. B.* v *Fainblatt,* 306 U. S. 601, 604, 607–608; *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 382–383 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 327 (C. A. 9); *N. L. R. B.* v. *Holtville Ice and Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9).

The record amply supports the Board's conclusion that Reed's operations have a substantial effect upon interstate commerce because of the interlacing of Reed's activities with those of other businesses, the interstate character of whose operations are not in dispute. Thus, as shown *supra,* p. 3, although Reed buys only a small amount of materials from out-of-state sources, it supplies materials and services in large quantities to public utilities, instrumentalities of commerce, and enterprises engaged in producing or handling goods destined for out-of-state shipment. During the years 1948 and 1949, Reed did over $550,000 worth of masonry work for such enterprises.[5]

Respondents' further assertion (R. 213) that the Board, in any event, abused its discretion in assert-

[5] In addition, as the Trial Examiner pointed out (R. 21–24, 27; 96, 115–6), Reed furnished services valued in excess of $110,000 in the construction of the multi-million dollar Stonestown De-

ing jurisdiction over Reed's operations is patently without merit. The Board for approximately a year prior to the discharge of employee Charlton had been asserting jurisdiction over the construction industry, and respondents, when they engaged in the unfair labor practices here involved, had no reason to believe that they would be immune from the Board's processes.[6]

Moreover, the amount of materials and services furnished by Reed to enterprises whose operations unquestionably affect interstate commerce was far in excess of the Board's minimum standards for discretionary assertion of jurisdiction. The Board in *Hollow Tree Lumber Co.,* 91 N. L. R. B. 635, 636, announced certain standards for the assertion of its jurisdiction which it set up to reflect "the results reached in the Board's past decisions disposing of similar jurisdictional issues." In that decision and in its press release issued a few days later on October

velopment project where employee Charlton was working at the time of his discharge. This project had received over $350,000 worth of materials from out-of-state sources prior to the hearing (R. 27; 141–3, 149–50, 152–5). In view of the clear impact of Reed's other operations upon interstate commerce, however, the Board found it unnecessary to rely upon Reed's part in the Stonestown project for its assertion of jurisdiction (R. 56).

[6] Cf. *N. L. R. B.* v. *Atkinson Co.*, 195 F. 2d 141 (C. A. 9) in which this Court denied enforcement of a Board order against two employers in the construction industry pointing out that prior to the Board's decision in *Ozark Dam Constructors*, 77 N. L. R. B. 1136, on June 16, 1948, the Board had declined to assert jurisdiction in the construction industry and holding that the Board's retroactive application of its policy to exercise jurisdiction in that industry resulted in an inequitable treatment of the employers under the circumstances of that case.

6, 1950 (Appendix, *infra,* pp. 27–29), the Board announced that it would assert jurisdiction over enterprises which furnish services or materials necessary to the operation of enterprises such as those of which the Board took cognizance in this case, provided that such goods or services are valued at $50,000 a year. The $550,000 worth of services and materials furnished by Reed to these types of businesses in 1948 and 1949 is accordingly well above the minimum standard. It is within the province of the Board, of course, to establish its standards for exercising jurisdiction. And as this Court stated in *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, "Providing the Board acts within its statutory and constitutional power, it is not for the courts to say when that power should be exercised." See also: *Haleston Drug Stores, Inc.* v. *N. L. R. B.,* 187 F. 2d 418, 421, certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Atkinson Co.,* 195 F. 2d 141 (C. A. 9).

Point II

The Board properly found that respondent Reed violated Sections 8 (a) (1) and 8 (a) (3) of the Act by discharging Charlton at the insistence of respondent Union and that respondent Union violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act by causing Charlton's discharge

A. In depriving employee Charlton of work because of his lack of union clearance, respondents were not protected by any valid union security agreement

Respondents do not challenge the Board's finding (R. 38, 56) that the Union, in demanding the termination, and Reed, in terminating,[7] the employment of

[7] Respondent Reed contended that Charlton was not discharged as alleged in the complaint but was only laid off "until he

Charlton because he did not have clearance from the Union were attempting to operate under closed shop conditions—that is, arrangements requiring union membership as a condition precedent to being hired (R. 50–51, 214). Closed shop agreements made subsequent to the amendment of the Act are, of course, outlawed under Section 8 (a) (3) of the Act.[8] Only those closed shop contracts executed prior to the amendments are valid under Section 102 of the Act. Respondents were not operating under any closed shop contract executed prior to the amendments and were therefore not protected by Section 102. As this and other courts have held, an employer not protected by a valid union security agreement violates Section 8 (a) (3) and (1) of the Act when he discharges or refuses to hire an employee because of the employee's lack of union membership or of approved union status and the union violates Section 8 (b) (2) and (1) (A) when it causes such job discrimination. *N. L. R. B.* v.

---

straightened out his difficulty with the Union Business Agent" (R. 33, 35; 10, 213, 81–83, 159, 192–193). Since a lay-off and a discharge are equally violative of the Act if done for illegal reasons, the choice of words here is of no consequence. *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 349–50.

[8] Section 8 (a) (3) permits the making only of union security contracts requiring as a condition of employment membership on or after the thirtieth day following the beginning of employment or the effective date of the agreement, whichever is the later, and legalizes job discrimination under such contracts only for failure to tender periodic dues or initiation fees. Until October 22, 1951, when Congress further amended the Act (Ch. 534, Public Law 189, par. (b), 82nd Cong., 1st Sess.), these union-shop contracts could be made only following certain prescribed election procedures. Section 102 of the Act, however, protects closed shop and other forms of union security agreements already in existence when the 1947 amendments were enacted.

Guerin, No. 12994, decided May 14, 1952 (C. A. 9), enforcing without opinion 92 N. L. R. B. 1698; *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 326 (C. A. 9); *Katz* v. *N. L. R. B.,* 196 F. 2d 411, 414–16 (C. A. 9); *N. L. R. B.* v. *International Union, etc.,* 194 F. 2d 698, 702 (C. A. 7); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 79, 81 (C. A. 2), enforcing 93 N. L. R. B. 127, 153, 157–158; *N. L. R. B.* v. *McKee & Co.,* 196 F. 2d 636 (C. A. 5); *N. L. R. B.* v. *Radio Officers Union,* 196 F. 2d 960, 965 (C. A. 2), union petition for certiorari pending; *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 525–27 (C. A. 7); *N. L. R. B.* v. *Jarka Corp.* (C. A. 3), August 15, 1952, 30 L. R. R. M. 2537; *N. L. R. B.* v. *Peerless Quarries, Inc.,* 193 F. 2d 419, 421 (C. A. 10). Cf. *N. L. R. B.* v. *Clara-Val Packing Co.,* 191 F. 2d 556 (C. A. 9).

Respondents contend, however, that they should be excused for violating the statute because of their inability to enter into a valid union shop contract due to the General Counsel's failure to process representation and union shop authorization elections in the construction industry (R. 50–51, 214, 218).[9] But this argument is entirely misplaced. Respondents were attempting to operate under *closed* shop, not *union* shop conditions. Besides, respondents' conduct would not have been lawful even if they had been operating under a valid union shop contract. The Union here

[9] Respondent Reed's further contention (R. 10, 36–37) that it should not be held responsible for laying Charlton off because it did so only on account of the Union's threat to cause other employees to cease work is plainly without merit. *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324, 327 (C. A. 9); *N. L. R. B.* v. *Star Publishing Co.,* 97 F. 2d 465, 470 (C. A. 9).

demanded Charlton's discharge because he did not have union clearance prior to being hired. Under a union shop contract the Union could lawfully have demanded Charlton's discharge for lack of acceptable status with the Union solely due to failure to tender his periodic dues.[10] It is undisputed that Charlton was not in arrears in his dues at the time of his discharge and that he thereafter tendered his dues but the Union refused to accept them (R. 34; 173, 181–182).

B. Respondents' contention that the discrimination against Charlton did not encourage union membership is without merit

Respondents contend, nevertheless, that they did not violate the statute because the discrimination against Charlton did not encourage union membership within the meaning of the Act. They apparently base this assertion on the fact that Charlton had for almost 40 years been a union member and continued to tender his dues to the Union subsequent to his discharge (R. 33–34, 57, n. 4; 217, 220). This argument ignores the effect that Charlton's discharge may have had upon the union adherence of other employees. It also ignores the fact that closed shop conditions for hod carriers have generally prevailed in the San Francisco area and, as the Board pointed out, Charlton may well have felt impelled to join and retain his membership in order not to "run the chance of being deprived of a

[10] See: Sec. 8 (a) (3) of the Act; *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Electric Auto-Lite Co.*, 196 F. 2d 500 (C. A. 6) enforcing, *per curiam*, 92 N. L. R. B. 1073, 1077–78, union and employer petitioners for certiorari pending.

continuing opportunity to earn his livelihood at his trade" in that area (R. 35–36 and n. 31; 84–85, 160, 171, 191, 127, 140). Moreover, as the Board further noted in *American Pipe and Steel Corp.*, 93 N. L. R. B. 54, 56, which it cited with approval in this case, "By the act of yielding to the [Union's] demand that [the employee] be removed, the Employer perforce strengthened the position of the [Union] and forcibly demonstrated to the employees that membership in, as well as adherence to the rules of, that organization was extremely desirable. Such encouragement of union membership was particularly effective when, as in the present case, the Employer deferred to the demand of the [Union] that employees be cleared through its hall, and membership appears to have been a condition precedent to obtaining the necessary clearance."

It is well settled, as this Court stated in *N. L. R. B.* v. *Walt Disney Products,* 146 F. 2d 44, 49, certiorari denied, 324 U. S. 877, that "the purpose and effect of a discriminatory discharge need not be shown by positive evidence but * * * if discouragement (or encouragement) as to union membership may reasonably be inferred from the circumstances of the discharge, the finding of the Board is binding upon the reviewing court."[11] And as this and other courts have recognized, union membership in the context in which it occurs in Section 8 (a) (3) of the Act

[11] See also *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595–596 (C. A. 9) and cases cited therein; *N. L. R. B.* v. *Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. A. 2); *N. L. R. B.* v. *Gaynor News Co., Inc.*, 197 F. 2d 719, 722 (C. A. 2).

embraces more than being listed on a union's membership roster; it is synonymous also with membership in good standing, which embraces union fealty and acceptance of the obligations of union membership. Thus, in the *Walt Disney* case, *supra,* this Court held that even though all employees were compelled under a closed-shop contract to be union members, the discharge of the union leader discouraged union membership within the meaning of the Act because it might encourage the employees to forego all active part in union affairs, thereby in effect relinquishing their union membership. See also *Paul Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 901–903 (C. A. 3) (discharge for making allegedly false statement in course of a report to fellow union members). Similarly an employer encourages union membership where, as here, he discriminates against a union member because of that member's failure to observe all the obligations of his union membership or because of his lack of union fealty. See *N. L. R. B.* v. *Guerin,* No. 12994, decided May 14, 1952 (C. A. 9) enforcing without opinion 92 N. L. R. B. 1698 (discharge of union member for failure to get union clearance); *N. L. R. B.* v. *The Radio Officers' Union, etc.,* 196 F. 2d 960 (C. A. 2), now pending before Supreme Court on union's petition for certiorari (denial of employment to union member for his failure to accept union principles and rules); *Colonie Fibre Co.* v. *N. L. R. B.,* 163 F. 2d 65 (C. A. 2) (discharge for nonpayment of dues retroactively imposed); *N. L. R. B.* v. *Jarka Corp.* (C. A. 3), decided August 15, 1952, 30 L. R. R. M. 2537 (refusal to hire union man not in "good standing"); *N. L. R. B.* v. *Electric*

Auto-Lite Co. 196 F. 2d 500 (C. A. 6), enforcing *per curiam,* 92 N. L. R. B. 1073, employer and union petitions for certiorari pending (discharge of union member for failure to attend union meetings); *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1011 (C. A. 7), certiorari denied, 324 U. S. 815 (discharge of conscientious objector who tendered dues but refused to take union oath).

Only one of the courts of appeals which have had occasion to pass on the question appears to have taken a more restricted view of the meaning of union membership. That court, the Eighth Circuit, in *N. L. R. B.* v. *International Brotherhood of Teamsters, etc.,* 196 F. 2d 1, 4 (C. A. 8), now pending before the Supreme Court on the Board's petition for a writ of certiorari, treated the term union membership as being no broader than "adhesion to membership" or remaining on the union's membership roster. In that case the employer, in the absence of a valid union security contract, delegated to the union control over the seniority list and denied job assignments to a union member who had been dropped by his union to the bottom of the seniority list for becoming delinquent in the payment of his dues. The Court held that such action, did not encourage union membership within the meaning of the Act where the employee testified that his union membership was not encouraged and no evidence was introduced to show that any other employee's union membership was encouraged. That court thus appears to be in disagreement with the other courts of appeals on two counts: (1) it does not consider that job discrimination which necessarily

encourages a union member to observe his union's policies or obligations—that is, to be in good standing—encourages his union membership since it does not necessarily encourage him to remain on the union's membership roster; and (2) it will not assume, but requires proof, that job discrimination for failure of an employee to pay his union dues encourages membership of other employees in the union. Because of the importance of these questions in the administration of the Act and of the conflict between the Eighth Circuit's decision and the decisions of the other courts of appeals, the Board has petitioned the Supreme Court to review the *Teamsters* decision.[12]

[12] In their motions for an extension of time in which to answer the Board's petition for enforcement, respondents have indicated that they are relying upon two other recent Eighth Circuit decisions to support their view that the discrimination against Charlton did not encourage union membership within the meaning of the Act. These cases, *Del E. Webb Construction Co.* v. *N. L. R. B.*, 196 F. 2d 841, and *N. L. R. B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 702, do not, we believe, support respondents' contention. In the first case, the Court set aside the Board's fact finding that the employer, acting pursuant to an illegal union security contract, denied employment to union members who had failed to receive clearance from their union. It held that there was no substantial evidence to support the Board's finding that an illegal union security contract existed or that the employees involved had made application for jobs to any authorized employer representative. It expressly reserved decision on whether "a practice of making all union laborers seek employment through their union halls is or is not an unfair labor practice" (196 F. 2d at 848).

In the second case the Court rejected the Board's finding of fact that the employer had discharged an employee because he was a member of a subcharter apprentice local rather than the parent journeyman local, thereby encouraging membership in the parent local and discouraging membership in the subcharter local. The Court held that the two locals should be treated as one union, but

We think, however, that regardless of the correctness of the Eighth Circuit's views in the *Teamsters* and *Webb* cases (see footnote 12), those decisions are not controlling in this case for respondents here were operating under unlawful closed-shop conditions and Charlton and other employees, as we have shown, could not relinquish their union membership without jeopardizing their job opportunities.

Point III

The Board's order is proper

In its answer to the petition for enforcement, respondent Reed contests that part of the Board's order which requires Reed to offer Charlton reinstatement (1) on the ground that Charlton was employed by Reed on a temporary basis until Charlton might be recalled by his regular employer and that the regular employer would normally have recalled Charlton on or about June 24, 1949, and (2) on the ground that subsequent to the issuance of the Trial Examiner's intermediate report, respondent Reed in fact reinstated Charlton (R. 214–215). Neither contention constitutes any defense to the Board's petition for enforcement.

---

that in any event, since the employee was not eligible for membership in the parent journeyman local, the discrimination against him because he was not a member of it could not encourage or discourage his union membership. (But *cf: N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, 722–723 (C. A. 2).)

Insofar as the *Webb* cases or either of them might possibly be subject to the interpretation respondents apparently place upon them, they are, of course, contrary to the great weight of authority, as above shown.

As to the first contention, the record shows that Charlton and two other employees were hired by Reed for an indefinite period, with Reed agreeing to release them to their former employer, Drake, upon the latter's request; that on or about June 24, 1949, Drake recalled the other two employees but did not recall Charlton because he had already heard from Charlton and another source about Charlton's trouble with the Union as a result of which Charlton could not go to work (R. 28; 157, 160, 168–171, 175). Since Reed hired Charlton for an indefinite period and the record does not show that Reed ever ceased to need his services, it cannot be assumed that absent Reed's discriminatory termination of his employment, Charlton would not have continued working for Reed after Drake failed to recall him. Under the circumstances, the Board's order requiring Reed to offer Charlton reinstatement is "adapted to the situation which calls for redress." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348.

As to Reed's second contention, it is immaterial whether Reed, subsequent to the Trial Examiner's findings and recommended order, may have offered Charlton reinstatement. The Board's order which is before this Court for enforcement is based upon the record made at the hearing before the Trial Examiner. It is well settled that partial or even full compliance by the respondent is no defense to enforcement of the order. *N. L. R. B.* v. *Mexia Textile Mills,* 339 U. S. 563, 567; *N. L. R. B.* v. *Pool Mfg. Co.,* 339 U. S. 577, 581, 582. Reed is, of course, relieved, under the Board's order, of back-pay

liability for any time he may have employed Charlton at his former or an equivalent job subsequent to the unfair labor practice found. Evidence of such reinstatement will become appropriate only in a post-decree compliance proceeding for determination of the exact amount of back-pay due. *N. L. R. B.* v. *Bird Machine Co.,* 174 F. 2d 404, 405–406 (C. A. 1) and cases there cited. See also, *N. L. R. B.* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 539 (C. A. 9), certiorari denied, 306 U. S. 646. In such a proceeding Reed, of course, will also have an opportunity to establish that Charlton's employment would have been discontinued for a non-discriminatory reason subsequent to the closing of the record in this case.

CONCLUSION

For the reasons stated, petitioner respectfully submits that a decree should issue enforcing the Board's order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FANNIE M. BOYLS,
RUTH C. GOLDMAN,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Secs. 151, *et seq.*), are as follows:

Definitions

SEC. 2. When used in this Act—

* * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:][1] *Provided further,*

[1] On October 22, 1951, Section 8 (a) (3) of the Act was amended by striking out the bracketed portion of the first sentence and inserting in lieu thereof the following:

"and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with section 9 (f), (g), and (h) and (ii) unless following an

That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from

---

election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:" (Public Law 189, par. (b), 82d Cong., 1st sess; 65 Stat. 601.)

engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, adopted by the Supreme Court

of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the

Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining

agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

* * * * *

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Release for morning papers (R–342)
Friday, October 6, 1950

N. L. R. B. CLARIFIES AND DEFINES AREAS IN WHICH IT WILL AND WILL NOT EXERCISE JURISDICTION

The National Labor Relations Board today announces the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards "reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues," the Board said:

> The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the

> fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.

The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to "have a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds."

The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).
2. Public utility and transit systems.
3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).
4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.
5. *Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.* [Italics added.]

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6 (a) and (b) above.

7. Establishments substantially affecting national defense.

U. S. GOVERNMENT PRINTING OFFICE: 1952